UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 120

Docket No. DC-1221-11-0737-W-1

Maria de la Cruz MaGowan,

Appellant,

v.

Environmental Protection Agency,

Agency.

October 26, 2012

Maria de la Cruz MaGowan, Bethesda, Maryland, pro se.

David P. Guerrero, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant petitions for review of the October 4, 2011 initial decision in which the administrative judge dismissed this individual right of action (IRA) appeal for lack of jurisdiction. For the following reasons, we find that the appellant established jurisdiction over her IRA appeal, and we REMAND the appeal to the regional office for adjudication on the merits.

BACKGROUND

¶2 The appellant, a GS-14 Program Analyst in the agency's Office of Solid Waste and Emergency Response, alleged in this IRA appeal that the agency took

several personnel actions in retaliation for her alleged protected whistleblowing activity. Initial Appeal File (IAF), Tab 1 at 3-5, 7, 10-15. The administrative judge gave notice of the elements and burdens of establishing jurisdiction over the appeal, and both parties responded. IAF, Tabs 3, 6-7.

¶3 Without holding the appellant's requested hearing, the administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction. IAF, Tab 18, Initial Decision (ID). She found that the appellant had alleged three personnel actions in her submissions to the Office of Special Counsel (OSC)[1]: (1) Changing the appellant's title from Lead Program Analyst to Program Analyst; (2) failure to promote the appellant to the GS-15 grade level non-competitively through the career ladder process; and (3) converting the appellant's approved sick leave to absence without leave (AWOL) for her September 30 and October 1, 2010 absences. *Id.* at 3-4. The administrative judge found that the Board lacked jurisdiction over the appellant's claim that the agency failed to non-competitively promote her to GS-15 because the appellant elected to pursue that claim through a negotiated grievance procedure. ID at 5-7; *see* IAF, Tab 7, Subtabs 2-6; Tab 6, Subtabs E-20 at 2, E-21, E-24. The administrative judge also found that the Board lacked jurisdiction over the appellant's reassignment to the Program Analyst position because she accepted the reassignment pursuant to the agreement that settled her prior IRA appeal.[2] ID at 7-8; *see* IAF, Tab 8, Subtab 4R (settlement agreement) at 2. Lastly, the administrative judge found that the appellant failed to nonfrivolously allege that

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[1] The administrative judge found that two of the personnel actions the appellant alleged before OSC were related, i.e., the lowering of her full performance level from GS-15 to GS-14 and the agency's refusal to appoint her to a GS-15 position, and were therefore the same personnel action for the purpose of this appeal. ID at 3-4.

[2] The appellant also filed a separate petition for enforcement concerning her prior IRA appeal, which the assigned administrative judge dismissed as untimely filed without good cause shown for the delay. *MaGowan v. Environmental Protection Agency*, MSPB Docket No. DC-1221-07-0068-C-1, Initial Decision (Sept. 9, 2011).

her 2003 disclosure was a contributing factor in the agency's decision to convert her approved sick leave for September 30 and October 1, 2010, to AWOL. ID at 9-12. The administrative judge therefore dismissed the appeal because the appellant failed to make nonfrivolous allegations sufficient to establish jurisdiction over any of the personnel actions alleged in her IRA appeal. ID at 12.

¶4 In her timely petition for review, the appellant only challenges the administrative judge's findings on the third personnel action noted above, i.e., the conversion of her approved sick leave for September 30 and October 1, 2010, to AWOL. Petition for Review (PFR) File, Tab 1 at 1-2. The agency responds in opposition. PFR File, Tab 3.

ANALYSIS

¶5 The Board has jurisdiction over an IRA appeal if the appellant has exhausted her administrative remedies before OSC and makes nonfrivolous allegations that: (1) She engaged in whistleblowing activity by making a protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001). Thus, in an IRA appeal, the standard for establishing subject matter jurisdiction and the right to a hearing, with respect to the disclosure and contributing factor issues, is assertion of a nonfrivolous claim, while the standard for establishing a prima facie case on the merits is that of preponderant evidence. *Langer v. Department of the Treasury*, 265 F.3d 1259, 1265 (Fed. Cir. 2001); *see Yunus*, 242 F.3d at 1371.

The appellant exhausted her administrative remedies before OSC.

¶6 The appellant included a copy of her OSC complaint with her initial appeal. IAF, Tab 1 at 36-50. In pertinent part, she alleged in her OSC complaint that she made a disclosure to the agency's Office of the Inspector General (OIG) in April or May of 2003, which resulted in a subsequent OIG report supporting her

allegations. *Id.* at 43. Also in pertinent part, OSC's April 21, 2011 final determination letter acknowledges the appellant's allegation that the agency converted her previously approved sick leave to AWOL. *Id.* at 17. Accordingly, we find that the appellant exhausted her administrative remedies before OSC for her 2003 disclosure and the agency's conversion of her previously approved sick leave to AWOL.

The appellant nonfrivolously alleged that her 2003 disclosure was protected.

¶7 The appellant asserted that in April or May 2003, she made disclosures to the OIG, which formed the basis for a 2004 OIG report. IAF, Tab 6 at 2. That report found, among other things, that the agency violated appropriations law and risked paying for work not performed on Level-of-Effort contracts. *Id.*, Subtab E-1 at 5-6. With regard to the agency's risk of losing funds obligated to contracts without ordering work, the OIG report cited a potential loss of $483,648 in unliquidated obligations. IAF, Tab 6, Subtab E-1 at 6. The Board has defined a gross waste of funds as "a more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government." *Downing v. Department of Labor*, 98 M.S.P.R. 64, ¶ 11 (2004). Accordingly, we find that the appellant has nonfrivolously alleged that she disclosed both a violation of law and a gross waste of funds in 2003. *See Van Ee v. Environmental Protection Agency*, 64 M.S.P.R. 693, 698 (1994) (disclosure of a $400,000 expenditure on a research study that the appellant reasonably believed was unnecessary, not in accordance with law, and a misallocation of resources, constituted a protected disclosure).

¶8 We make clear, however, that we are not finding, on the merits, that the appellant made disclosures that she reasonably believed evidence the kind of wrongdoing defined at 5 U.S.C. § 2302(b)(8). The proper test for determining whether an individual had such a reasonable belief is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable

by that individual could reasonably conclude that the actions of the government evidence wrongdoing as described at 5 U.S.C. § 2302(b)(8). *Lachance v. White*, 174 F.3d 1378 (Fed. Cir. 1999). On remand, as part of her burden of proof on the merits of her claim, the appellant must establish by preponderant evidence that a reasonable person in her circumstances would have believed that she was disclosing a violation of law, rule, or regulation, or a gross waste of funds. *See Weed v. Social Security Administration*, 113 M.S.P.R. 221, ¶ 21 (2010); *see also Langer*, 265 F.3d at 1265.

The appellant nonfrivolously alleged that her disclosure was a contributing factor in the agency's decision to take a personnel action.

¶9 To satisfy the contributing factor criterion at the jurisdictional stage, an appellant need only raise a nonfrivolous allegation that the fact of, or content of, the protected disclosure was one factor that tended to affect the personnel action in any way. *Mason v. Department of Homeland Security*, 116 M.S.P.R. 135, ¶ 26 (2011). The administrative judge found that the passage of more than 7 years between the appellant's 2003 disclosure to the agency's OIG and the conversion of her approved sick leave to AWOL for absences on September 30 and October 1, 2010, was too long of an interval to satisfy the knowledge-timing test.[3] ID at 10. Thus, the administrative judge determined that the appellant failed to nonfrivolously allege that her 2003 disclosure was a contributing factor in the agency's decision to convert her approved sick leave to AWOL. *Id.*

[3] Under the knowledge-timing test, an employee may nonfrivolously allege that a disclosure was a contributing factor in a personnel action through evidence that the official taking the personnel action knew of the disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *Mason*, 116 M.S.P.R. 135, ¶ 26; *see* 5 U.S.C. § 1221(e)(1). However, the knowledge-timing test is only one of the ways by which an appellant can meet the contributing factor criterion. *Rubendall v. Department of Health & Human Services*, 101 M.S.P.R. 599, ¶ 12 (2006).

¶10 However, the appellant alleged in her submissions below that when she requested a promotion in May 2010, Ms. Lowery specifically asked her about the 2003 OIG disclosure. IAF, Tab 9 at 7. Further, the appellant alleges that Ms. Lowery demanded the details of the disclosure and requested that the appellant provide her with a copy of the OIG report. *Id.*; *see* Tab 6, Subtab E-1 (OIG report). Thus, the appellant alleged that her supervisor asked about that 2003 disclosure and then learned more about it approximately 6 months before taking the personnel action at issue. *Id.* "Any weight given to a whistleblowing disclosure, either alone or in combination with other factors, can satisfy the contributing factor standard." *Dorney v. Department of the Army*, 117 M.S.P.R. 480, ¶ 15 (2012) (citing *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993); *Powers v. Department of the Navy*, 69 M.S.P.R. 150, 156 (1995)). Therefore, the record reflects that the appellant did not engage in unsubstantiated speculation, but instead raised a material issue about the agency's reasons for its action. IAF, Tab 9 at 7; *see Dorney*, 117 M.S.P.R. 580, ¶ 17. We therefore find that the appellant has nonfrivolously alleged that her 2003 disclosure to the OIG was a contributing factor in the agency's decision to convert her approved sick leave for September 30 and October 1, 2010, to AWOL. Again, as noted above, in order to prove her claim on the merits, the appellant will need to establish by preponderant evidence that her allegedly protected disclosures were a contributing factor to the personnel action at issue in this IRA appeal. *See Weed*, 113 M.S.P.R. 221, ¶ 21; *see also Langer*, 265 F.3d at 1265.

¶11 Lastly, we note that the administrative judge went on to consider whether the agency established by clear and convincing evidence that it would have taken the same personnel action in the absence of the alleged whistleblowing. ID at 10-12. However, that is a merits issue, and the administrative judge should not have reached it without first finding jurisdiction over the appeal. *See Schmittling v. Department of the Army*, 219 F.3d 1332, 1336-37 (Fed. Cir. 2000) (the Board

must first address the matter of jurisdiction before proceeding to the merits of an IRA appeal). Thus, we VACATE the initial decision with respect to the administrative judge's findings on whether the agency established by clear and convincing evidence that it would have taken the same personnel action in the absence of the alleged whistleblowing. The administrative judge should make findings on that issue after considering any additional evidence submitted after remand.[4]

ORDER

¶12 Accordingly, this appeal is REMANDED to the Washington Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.

[4] The appellant's assertions on review that she provided proper medical documentation to support her September 30 and October 1, 2010 leave requests are immaterial at the jurisdictional stage, and we therefore have not considered them. *See* PFR File, Tab 1.